

## **TECHNICAL ASSISTANCE – CHAPTER 10**

### **PERSONAL SERVICES CONTRACTS**

Prepared by the Division of Human Resources in the Department of Personnel & Administration July 2003

#### **Contracts**

The term contract as applied by these provisions of Chapter 10 of the Director's Procedures does not include acquisitions where a commitment voucher, e.g., state contract, purchase order, is not required by fiscal rule.

In previous years, most personal services commitments required review by the State Personnel Director. With the adoption of the new administrative procedures, effective January 2002, a dollar limitation has been established on commitments where no encumbrance document is required by fiscal rule 2-2 as established by the State Controller. The current dollar threshold is \$5000.

Q1. Can a commitment be split to avoid personal services review, e.g., purchase order for \$6000?

A1. No. If at the time of purchase an agency knows the service will exceed \$5000 and a program waiver is not currently in place, the agency must submit the commitment for personal services review. The program uses the guidance provided by the State Purchasing Office/State Controller's Office in defining when a requirement has been split.

Q2. Does the \$5000 limitation apply to each transaction or an aggregate of services with any vendor?

A2. The total aggregate for any given service determines whether personal services review is required. Agencies must establish at the time of purchase whether or not the service will exceed \$5000 within a fiscal year. If the services can reasonably be defined (in terms of scope, price and time of performance) at the time of the order, and the total exceeds \$5,000, then that commitment voucher will need to be submitted for review.

Example 1: Agency A decides it needs to purchase janitorial services for the month of January and this need will continue through June. The cost for the six months totals \$4999.99. This requirement is reasonably defined at the beginning of the performance period and because the dollar amount does not exceed the \$5000, a request does not need to be submitted for review.

Example 2: Agency B decides it needs to hire a temporary for the month of July to cover an employee's absence and the transaction is less than \$5000. The agency believes that by the end of July the state employee will return and the need for temporary services will not continue. In the month of August the state employee cannot return and the need for

the temporary continues. The dollar threshold of \$5000 will be exceeded; this requires review.

Example 3: A division in Agency C decides it needs consulting services with a vendor for four months at a cost of \$4,000. Another division in Agency C needs consulting services on a different program for three months later in the fiscal year for \$3,000. The deliverables are different. In this case, the services are different and no review would be required.

- Q3. An analysis was performed at the time of purchase and it was determined that this particular service was a one-time need and it was under the \$5000 limit; however, through the course of the year, the service had to be obtained again which exceeded the \$5000 limit. Will this be considered a violation?
- A3. No. The determination of program needs should be established at the time of purchase, if possible. However, program requirements change and agencies do not always know long-term program needs so this will not be considered a violation. The test is whether the requirement (in terms of scope, price, and time of delivery) is reasonably defined at the time of the initial purchase. If a pattern of this nature is established within an agency, further analysis and evaluation will need to be conducted. See also Example 3 above.
- Q4. Do zero-dollar contracts fall within the \$5000 limitation of review?
- A4. No. While zero-dollar contracts may be revenue generating or may have no fiscal impact, the services that are being obtained may have an indirect or direct impact on the state personnel system. Example: collection services, estate recovery services, etc. Personal Services review is required on these contracts.
- Q5. If an agency is obtaining services listed on the *Prior-Approval Checklist* and the services are under \$5000, must the agency obtain a pre-approval waiver from the program that provides the service, e.g., Central Services, Juniper Valley, Workforce Development (training)?
- A5. Yes. Even though this falls under the \$5000 threshold, agencies still need to obtain prior approval from the program before entering into an agreement. Documentation must be kept on file. These state programs have first right of refusal on services regardless of the personal services dollar threshold.

### **Independent Contractor**

Contracts are reviewed by the State Personnel Director to examine whether the independent contractor test is met. The criteria for determining independent contractor status are established by the State Controller as set in fiscal rule 3-1.

Agencies looking to address staffing issues with temporary or contingent workers must consider the legal implications of the employer-employee relationship. Relevant factors must be

examined to make sure that this type of action does not create potential liability for the state and agencies. Potential liabilities are as follows:

- Under FLSA, penalties for mischaracterization of an independent contractor could include unpaid overtime or minimum wage, liquidated damages, fines, and criminal sanctions. These could triple if the violation is willful and personal liability could be pursued. In addition to agencies being held liable for flagrant violations of federal and state law, individuals who willfully violate the rule in approving such actions could be held personally liable and incur the same fines and penalties.
- Under the IRS, a percentage of an agency's payroll could be assessed (this fine could triple if the action is done willfully), as well as FICA penalties and potential litigation settlements.

Here are three key determining factors when qualifying an individual as an independent contractor.

1. Behavior control – Does the employer direct or control how the worker performs the task? Generally, someone who is told when, where and how to perform the work, what tools or equipment to use, what workers to hire, where to purchase supplies, and the order in which to do the work, should not be considered an independent contractor.
2. Financial control – What is the worker's investment in the facilities he or she uses, to what extent is the worker making his or her services available to other organizations, how is the worker paid, and can the worker realize profits and losses from the services provided to the state? If one invests in the facilities and tools used, and if one's service is also available to others, this worker may be considered an independent contractor.
3. Nature of the relationship – Is the organization providing benefits to the worker, are taxes being withheld from the worker's pay, are employer's taxes being paid on behalf of the worker, is the relationship expected to continue indefinitely, and is the service provided by the worker essential to the regular business of the organization? If so, the worker may not be considered an independent contractor.

The following is the common law test most courts continue to apply.

- The greater the skill required to do the job, the more likely the individual is an independent contractor.
- Individual supplies his or her own tools and materials.
- The longer the relationship, the more likely there is an employer-employee relationship.
- The fact that the person who pays for the work has the right to assign additional projects to the worker without additional compensation and without altering the terms of a contract indicates employee status - an independent contractor relationship is generally contractual.
- An employer who determines the work schedule suggests an employment relationship.
- An individual who is paid by the hour or other time period is more likely to be considered an employee.
- Where the employer hires, fires, and pays the individual's assistant (rather than the worker himself or herself), suggests an employee-employer relationship.

- An individual who works in a field that is not the company's ordinary line of business will be more likely be an independent contractor.
- The fact that a worker is in business for him or herself and has all the appropriate licenses suggests independent contractor status.
- The fact that a worker is treated as an employee for tax purposes indicates an employment relationship.
- Where an individual is integrated into the employer's business to a great extent, the individual is more likely to be considered an employee.
- The establishment of a set amount of work hours suggests employee status.
- The fact that an individual works on the employer's premises suggests employee status.
- An individual who works according to a sequence set by the employer will more likely be deemed an employee.
- An individual who is reimbursed for expenses is more likely an employee.
- An individual's work results in the possible realization of a profit or the risk of a loss suggests independent contractor.
- An individual who works for more than one firm at a time is more likely to be an independent contractor.
- The fact that the employer has the right to discharge the individual suggests an employment relationship.

Q1. Due to the budget reductions, layoffs were necessary. Is it possible to immediately re-hire a laid-off employee from a temporary employment service as an independent contractor to perform the same or similar work performed as employees?

A1. This practice is not permitted under federal and state law and will expose the state to greater potential liability. Current employees are unlikely to qualify as independent contractors given the considerations above. In addition, CRS 24-18-201 prohibits an employee from being retained via a personal services contract within six months of termination. CRS 24-50-507 prohibits employees from accepting any direct or indirect personal benefit from a contracting agency. In other words, an employee cannot obtain a contract with the state to perform work that he or she had a direct interest in, e.g., the job.

If the state hires laid-off employees or current employees (permanent or temporary) within six months to continue to perform the same or similar work prior to lay-off, they cannot be considered independent contractors. These individuals will be eligible for benefits, and could have standing to pursue legal action against the state. Although changing current employees to independent contractors may appear to save some costs, this change would be in violation of federal law, state statute and rules and will put the state at risk for legal action, heavy fines, and IRS penalties.

Q2. What if the contractor does not meet all of the criteria? Does this mean it is not an independent contractor?

A2. The contractor is required to meet most of the criteria, not all.

### **Personal Services Contracts Implicating the State Personnel System**

- Q1. How is it determined that a contract implicates the state personnel system?
- A1. Any contract that involves services commonly or historically performed by state employees, e.g., highway maintenance, custodial services, IT services, procurement, etc. The agency's HR Administrator is a resource for making this determination and should be consulted before entering into an agreement.
- Q2. What type of factual information is needed to satisfy the requirement that no employee has been adversely impacted by a contract?
- A2. Factual information, not conclusory statements, must be submitted, e.g., a list of positions affected, the plan for those positions (e.g., reassignment or allocation), future outlook for the program and supporting documentation that shows no employee will be negatively impacted by that contract.

### **Personal Services Contracts Not Implicating the State Personnel System**

#### **“Scope” Difference**

This provision only applies to state programs in place prior to April 7, 1993. The legislature provided a grandfather clause in statute for those agencies that needed to utilize contractors in certain program areas already in existence prior to April 7, 1993.

- Q1. How is “scope” applied?
- A1. If property rights are not adversely affected, it is permissible to maintain a limited amount of contractors to address fluctuating business needs. “Scope” is defined as the ratio of state FTE to contract FTE. It is allowed to change slightly.
- Q2. How do agencies demonstrate the need to continuously maintain contractors?
- A2. This can be demonstrated by the agency tracking program growth and FTE growth, both state FTE and contractor FTE. For example: An agency needs to maintain acquisition/relocation services. Based on the agency's plan, it anticipates needing \$100,000 and 1.5 FTE to maintain fluctuating service demands. However, the fluctuating demands do not warrant petitioning for permanent FTE because the service demand is expected to decrease the following year. Therefore, the agency can produce documentation that supports these facts. This information is maintained and tracked from year-to-year by calculating the difference between state FTE and contract FTE. A full time FTE is equivalent to 2080 hours within a 12-month period.

Q3. How is “scope” measured?

A3. The ratio for contractor growth is capped at 5% and there is also a direct link to program funding. If an agency’s total program funding were to increase 6% within a fiscal year, the FTE growth would then increase by 6%. The current capped 5% is added to the difference in percentage of program funding. This is not intended to be a substitute for seeking permanent FTE where there is an ongoing need.

### **Waiver of Review**

Approval will remain valid on contracts from year to year so long as it does not materially change. Modifications will not need to be reviewed if they meet the original terms of the approval, i.e., scope and dollar amount do not change, unless otherwise indicated. If there is a material change, the basis of approval could also change.

Q1. What is considered a “material” change to a contract?

A1. Changes through formal amendments, change order letters, option letters, renewals, bilateral change orders, unilateral change orders, and funding letters that significantly change the scope of work or the contract dollar amounts.

### **Pre-Approval Prior to Competitive Procurement**

All competitive solicitations, e.g., documented quotes, invitation for bids (IFB), and requests for proposals (RFP), must be reviewed at the beginning of the procurement process. If the solicitation can be granted approval, this may negate the need to route the final contract for review and approval provided it falls within the scope of the original solicitation.

Q1. What type of documentation is needed for a pre-approval?

A1. The *Certification for Personal Services Agreements Form* along with the complete solicitation is needed. The solicitation can be submitted via email and the certification form can be faxed. The entire solicitation must be submitted for review.

Q2. Can the solicitation be sent for review and approval simultaneously with being released to the public?

A2. Yes. Immediate submission of the solicitation for review upon release of the solicitation on BIDS is encouraged. That way, should a problem arise with the approval of the solicitation, it can be amended or cancelled early in the process. In addition, completed solicitations can be submitted any time prior to release on BIDS.

Q3. How long is the review process and how is it approved?

A3. The goal for completion of any review, i.e., RFP, IFB, contract or purchase order, is four business days. The agency will receive a letter of approval or denial stating the terms and conditions on pre-approvals.

- Q4. What happens if the solicitation cannot be pre-approved?
- A4. In some cases the solicitation may not provide enough information to grant a pre-approval, e.g., dollar amounts have not been determined, scope of work is not established, term of contract is not defined. Should this be the case, an initial approval will be granted for the solicitation with the condition that the final contract requires final review and approval.
- Q5. Should solicitation amendments be submitted for review?
- A5. Solicitation amendments that do not materially change the scope of services performed, e.g., answers to offeror inquiries, changes in bid/proposal receipt dates, or minor technical clarifications, do not have to be re-submitted for review. Modifications that increase the period of performance of services, materially affect labor pricing, or change the scope of work, must be submitted for review.

### **Temporary Services**

If an individual has been hired in one program area as a state temporary and is subsequently hired in another area of the program as a contract temporary, this is allowable provided the duties are unrelated.

Example: A state temporary employee is performing fieldwork, as a park ranger. Once the six-month temporary appointment expires, this individual decides to work for the same program performing secretarial duties. This is acceptable because the duties are unrelated.

- Q1. What if the six-month temporary status has expired and the agency needs the service to continue? Can the same person be hired as a contract temporary in the same job?
- A1. No. This violates state constitution and statute.

Every attempt is made to keep these interpretive guidelines updated. Subsequent revisions to rule or law could cause conflicts in this information. In such a situation, the laws and rules are the official source upon which to base a ruling or interpretation. This document is a guide, not a contract or legal advice.